Supreme Court, U.S.
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No. 06-856

IN THE

Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT IN REPLY TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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The Solicitor General advances several arguments in support of his recommendation that this Court grant *certiorari*. None of them is persuasive. Instead, they confirm Respondent's view that the larger concerns identified by the government are more appropriately left to Congress.

A. The question about the scope of ERISA Section 502(a)(2) does not warrant this Court's review.

1. The Solicitor General theorizes that Petitioner might have had a claim under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), even though Petitioner did not proceed under

that provision. Although Petitioner sought relief exclusively in the form of alleged lost profits in his individual plan account, measured by the ostensible greater investment return he would have achieved had the plan fiduciaries acted promptly on his requests to change certain mutual fund investments,[1] the Solicitor General would regard that as an effort to recover "losses to the plan" within the meaning of ERISA Section 409(a), 29 U.S.C. § 1109(a). The theory is that, because Petitioner's individual account is held in a "unitary trust," the claimed reduction to Petitioner's individual plan account is actually a loss to the plan. U.S. Br. 6. The Solicitor General then hypothesizes that a recovery for the individual would inure to the benefit of the plan as a whole because it "may be used" to defray the plan's operating costs. U.S. Br. 7. The argument does not withstand scrutiny.

In urging a theory never advanced by Petitioner below, the Solicitor General is in the awkward position of advocating a result not sought by Petitioner. In the district court, Petitioner sought only "make whole" or other equitable relief under ERISA Section 502(a)(3), to obtain a monetary recovery following an alleged delay in processing his requests to change certain investments. Pet. App. 3a. The money was to be given to him, as make whole relief, and not to the plan. Petitioner advanced no claim under ERISA Section 502(a)(2), explicitly or otherwise.[2] Petitioner neither sought to recover

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[1] This damages theory is, of course, asymmetrical. If the plan is tardy in executing an investment change directed by the participant (or if the change is negligently not executed as directed), and the change in hindsight turns out to have yielded a better investment return, the participant can claim the lost profit as damages. Of course, if the change turns out to be ill-advised, because investment returns would have been lower had the change been executed, the participant will happily overlook the mistake.

[2] The Solicitor General is correct in acknowledging that § 502(a)(2) was not raised by Petitioner in the district court. Petitioner's contrary assertion in his reply brief, Pet. Rep. Br. 2, n.2, is demonstrably incorrect and misleading.

losses allegedly sustained by any other plan participants; nor did he seek relief on behalf of the plan or bring suit in any representative capacity. To be sure, in language that is arguably dicta, the Fourth Circuit entertained Petitioner's § 502(a)(2) argument.[3] But Petitioner did not make the argument that the Solicitor General tenders to this Court. In the Fourth Circuit, Petitioner argued that the prayer for relief in his complaint, which sought "make whole" relief, Br. in Opp. App. 4a, could nonetheless be interpreted as seeking a remedy to the plan, because Petitioner was still a plan participant.[4] Brief for Plaintiff-Appellant, *LaRue v. DeWolff, Boberg & Associates, Inc.*, 450 F.3d 570 (No. 05-1756) 2004 WL 3545170 (Sept. 16, 2004). Petitioner did not advance the specific theory now suggested by the Solicitor General. Nor Petitioner did pursue the outcome suggested by the Solicitor General, in which the putative recovery would go into the plan to be available for payment of plan expenses before the remainder (in some indeterminable amount) would be distributed to Petitioner's individual account.

The Solicitor General's theory is ill-conceived because Petitioner's claim does not involve a "loss to the plan" under any conventional approach to statutory interpretation. ERISA Section 409 authorizes only a claim that "inures to the benefit

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[3] In suggesting that Petitioner sought recovery to the plan in the district court, the government quotes language in a brief filed by Petitioner in that court. U.S. Br. 5. The reference is inaccurate. The quoted language was Petitioner's effort to distinguish *Rego v. Westvaco Corporation et al.*, 319 F.3d 140 (4th Cir. 2003), controlling Fourth Circuit precedent on the scope of "appropriate equitable relief" within the meaning of Section 502(a)(3). Br. in Opp. App. 50a. By definition, any damages relief available under Section 502(a)(3) goes to the plan participant or beneficiary, rather than to the plan.

[4] That theory is of no help to either Petitioner or the Solicitor General with respect to § 502(a)(2), as "make whole relief" is an inherently individual concept of equitable relief. *See Abermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

of the plan as a whole." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 140 (1985). The aggregation of individual plan accounts in a defined contribution plan does not convert Petitioner's personal claim into an action to recover losses "to the plan." In suggesting otherwise, the Solicitor General imagines a sort of straw transaction, in which the putative recovery would pass through the plan, strictly as a legal fiction, in order to end up in Petitioner's individual plan account.[5]

The government's suggestion is speculative in any event. Money recovered by a trust typically cannot be "earmarked" for a particular beneficiary, unless such an allocation is specifically provided by the plan document. In a defined contribution plan, any recovery presumptively would go to the plan to be allocated among all the participants.[6] ERISA fiduciaries are obligated to act strictly in accordance with the terms of the plan documents and other instruments creating ERISA plans. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104 (a)(1)(D). The specific terms of the plan document necessarily govern questions of this sort. *See, e.g., Hunt v. Hawthorne Associates Inc.*, 119 F.3d 888, 892, n.3 (11th Cir. 1997) (when determining whether a breach of fiduciary duty has occurred in the course of plan administration, the plan documents are of "seminal importance"). The plan document is not in the record, because these arguments were never raised below. Accordingly, this Court cannot properly assess

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[5] This construct reveals the Solicitor General's unstated premise that any recovery should actually pass directly to Petitioner, outside the plan. That premise is, of course, consistent with the damages relief actually sought by Petitioner. But the government cannot say this explicitly, as it would be fatal to its argument.

[6] The Solicitor General misreads the Department of Labor's Field Assistance Bulletin. U.S. Br. 6. Nothing in that regulatory guidance endorses the specific form of allocation suggested by the government; nor could it trump the specific language of the plan document.

how the plan would allocate the recovery hypothesized by the Solicitor General.[7]

More broadly, there is nothing surprising about Congress' choice that § 502(a)(2) is available only to recover losses to the plan, and not individual complaints. The passage of time has confirmed the wisdom of this Court's conclusion in *Russell* that a "fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." 473 U.S. at 142. The Solicitor General suggests no compelling reason to reexamine *Russell*. The government's position is fundamentally at odds with this Court's teaching in *Russell* that an interpretation of § 502(a)(2) to allow recovery of alleged losses suffered by an individual plan participant would effectively obliterate the distinction Congress made in specifically providing for plan remedies in § 502(a)(2) and for individual remedies in § 502(a)(1) and § 502(a)(3). 473 U.S. at 144. And the Solicitor General's argument is ironic in that Petitioner correctly understood that § 502(a)(2) would not provide the individual relief he sought, which is why Petitioner proceeded exclusively under § 502(a)(3).

2. The Solicitor General is likewise incorrect (U.S. Br. 8-9) in suggesting that the Fourth Circuit's decision creates an actual circuit conflict on the § 502(a)(2) issue. None of

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[7] Because the case was resolved on a motion for judgment on the pleadings, and solely on the § 502(a)(3) theory pleaded by Petitioner, the record is inadequate in other respects. The record does not describe the specific investment choices requested by Petitioner, whether his requests were honored in whole or in part, or whether he subsequently changed his mind. There is nothing to indicate the length of, or explanation for, the alleged delay in processing Petitioner's investment directions. The answers to these questions, and perhaps others, would be critical to the fact-intensive inquiry necessary to assess whether the damages claimed by Petitioner was in some broader sense an injury to the plan.

the cases cited by the Solicitor General directly holds that an individual may bring a § 502(a)(2) claim solely on behalf of his own interests. To the contrary, those cases support Respondent's position that, consistent with *Russell*, § 502(a)(2) permits an action only on behalf of the plan.

For example, in *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995) in which a subclass of plan participants sued for a breach of fiduciary duty, the court observed: "Although an individual may bring a § 1109 claim, this court has repeatedly held that ERISA does not permit recovery by an individual who claims a breach of fiduciary duty." *Id.* at 1452-53. Similarly, in *Steinman v. Hicks*, 352 F.3d 1101 (2003), the Seventh Circuit did not "reject" the district court's analysis that an individual could not recover his individual losses. Instead, the court's analysis of § 502(a)(2) was limited to determining that plaintiffs' claims were appropriate under that provision of ERISA because they were seeking relief for losses to the plan, "whereas § 502(a)(3) is the vehicle for suits by individuals who are seeking relief on their own behalf." *Id.* at 1102. *Schering-Plough Corp. ERISA Litigation*, 420 F.3d 231 (3d Cir. 2005) is likewise consistent with the Fourth Circuit's decision below. Plaintiffs in that case alleged that the company failed to disclose that it had unlawfully and artificially inflated company shares that the company offered as part of a savings plan. In finding that the action was appropriate under § 502(a)(2) the Court reasoned, "the recovery . . . would go to the Plan as a whole to be held in accordance with the terms of the plan, including the payment of operating expenses and the like, which would redound to the benefit of all participants." *Id.* at n. 4.

3. The Solicitor General's suggestion that the Fourth Circuit's decision will result in calamitous outcomes is also misplaced. ERISA provides a range of effective remedies to address systemic or other widespread fiduciary breach situations. Cases like *Schering Plough* and *Milofsky v.*

American Airlines, 404 F.3d 338 (5th Cir. 2005), *rev'd on reh'g en banc*, 442 F.3d 311 (2006) demonstrate that § 502(a)(2) is available in appropriate cases involving allegations of systemic fiduciary breach, including cases presenting the issue expressed by the government about misrepresentations that adversely affect the price of publicly-traded stock held by participants in defined contribution plans. And this Court's decision last Term in *Sereboff v. Mid-Atlantic Med. Svcs., Inc.* 126 S. Ct. 1869 (2006), reconfirms the availability of restitution as "appropriate equitable relief" available under § 502(a)(3). The concerns expressed by the Solicitor General with respect to allegations of systemic fiduciary breach are best saved for another day, in a case with a fully developed record that directly presents those issues.

B. The question about the scope of Section 502(a)(3) also does not warrant this Court's review.

1. The Solicitor General claims that the relief sought by Petitioner should be viewed as "appropriate equitable relief" within the meaning of ERISA § 502(a)(3), on the premise that an individual in Petitioner's circumstances would otherwise be without a remedy. U.S. Br. 19. That argument ignores the indisputable fact that Petitioner simply elected not to pursue any form of equitable relief traditionally available under § 502(a)(3), *e.g.*, a request for injunctive relief, because Petitioner was exclusively interested in a damages recovery. Br. in Opp. App. 4a.

The Solicitor General's suggestion that Petitioner's claim for money damages could be repackaged as a demand for surcharge is without merit. Changing the label does not change the fundamental nature of a claim. Nor would it convert a claim for money damages into "appropriate equitable relief" within the meaning of § 502(a)(3). *See McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376 (9th Cir. 1996); *Knieriem v. Group Health Plan, Inc.*, 434 F.3d 1058, 1064 (8th Cir. 2006) ("Merely re-labeling the relief sought as 'restitution' or

'surcharge' does not alter the nature of a remedy from monetary to equitable"). It is telling that this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) nowhere includes surcharge in its list of remedies "typically" available in equity. *Id.* at 215 (listing "injunction," "mandamus," and "restitution" as catagories of relief typically available in equity).

It is probably true enough that courts of equity were historically capable of expanding the range of their equitable powers to make up for the fact that the divided bench often left equity courts incapable of assessing damages in a straightforward manner. But the modern understanding of the division between legal and equitable remedies—as reflected in ERISA—is much more clearly defined and rarely entails that kind of overlap. Adoption of the rule suggested by the Solicitor General—creation of an equitable remedy called "surcharge" that is in every respect a traditional damages remedy—would eviscerate the distinction reflected in the statute. *Mertens v. Hewitt Associates*, 508 U.S. 248, 257-58 (1993).

In any event, the Solicitor General is incorrect in asserting Fourth Circuit's decision "deepens an existing conflict among the court of appeals." U.S. Br. 16. The Solicitor General cites a case from the Seventh Circuit, *Bowerman v. Wal-Mart Stores, Inc.* 226 F.3d 574 (2000). *Bowerman* was issued two years before this Court's decision in *Great-West*, and merely concluded that monetary relief was appropriate there under the doctrine of restitution, a theory not available to Petitioner. *McDonald v. Household Int'l, Inc.*, 425 F.3d 424, 430 (7th Cir. 2005) simply quotes the concurrence in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), in dicta, while acknowledging that appellant may not recover consequential damages under ERISA. Contrary to the government's suggestion, courts have consistently held, both before and since *Great West*, that a pure claim for money damages is not available

under § 502(a)(3) in the absence of facts establishing restitution. *See, e.g., Eichorn v. AT&T Corp.*, 484 F.3d 644 (3d Cir. 2007); *Alexander v. Bosch Auto Sys., Inc.*, 2007 WL 1424299 (6th Cir. May 14, 2007); *Coan v. Kaufman*, 457 F.3d 250, 262-64 (2d Cir. 2006); *Calhoun v. TWA*, 400 F.3d 593, 596-98 (8th Cir. 2005); *Callery v. United States Life Ins. Co.*, 392 F.3d 401, 405-09 (10th Cir. 2004) *cert. denied*, 126 S.Ct. 333 (2005); *Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 481-82 (6th Cir. 2001) *cert. denied*, 535 U.S. 928 (2002).[8]

As this Court recognized in Mertens, "[ERISA is] an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all favors of potential plaintiffs." *Id.* at 262. This Court has been properly reluctant to imply additional remedies to participants in ERISA cases, to avoid upsetting the "interlocking, interrelated, and interdependent remedial scheme" contained in ERISA. *Russell*, 473 U.S. at 146. The remedy the Solicitor General advocates is similar to an amendment to

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[8] The Solicitor General's arguments that monetary relief should be available under § 503(a)(3) have been made unsuccessfully several times by the Department of Labor. *See, e.g.*, Brief for the Sec'y of Labor as *Amicus Curiae* supporting Appellant's Petition for Panel and En Banc Rehearing, *Pereira v. Farace*, 413 F.3d 330 (2nd Cir. 2005), *cert denied* (No. 03-11087) (July 25, 2005) available at http://www.dol.gov/sol/media/briefs/pereirabrief.pdf; Brief for the Sec'y of Labor as *Amicus Curiae* supporting Appellant and Requesting Reversal, *Goeres v. Charles Schwab & Co.*, 2007 WL 495191 (9th Cir. Feb. 14, 2007) (No. 05-15282) (July 11, 2005) available at http://www.dol.gov/sol/media/briefs/goeres(A)-07-11-2005.pdf; Brief for the Sec'y of Labor as *Amicus Curiae* Supporting Appellant and Requesting Reversal, *Gallery v. U.S. Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004), *cert denied* (No. 03-4097), 2003 WL 24309395 (March 25, 2005); Brief for the Sec'y of Labor as *Amicus Curiae* supporting Plaintiff-Appellant and Urging Reversal, *Coan v. Kaufman*, 457 F.3d 250 (2nd Cir. 2006) (No. 04-5173), 2005 WL 5071038 (August 20, 2003) (all arguing that money damages for breaches of the trust relationship were typically available in equity and therefore should be available under § 502(a)(3)).

ERISA proposed by former Senator Wellstone in S. 1919, 107th Cong. § 2 (2002). This case provides no compelling reason for this Court to amend the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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